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Jus Pacis ac Belli?

Prolegomena to a Sociology of International Law

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THE TRADITIONAL SYSTEM OF INTERNATIONAL LAW is based on the distinction between the law of peace and the law of war. In the formative period of international law, thinkers were fully aware of the problem hidden behind this classification. Positivist writers took over these conceptions, framed against the background of a philosophical vista of society. Yet in their hands these terms lost their original significance. It is the purpose of this investigation to throw light on this process and to consider the relevance of this dichotomy into peace and war for the positivist and sociological approaches to international law.

The Naturalist Basis of the Dichotomy

Conceptions such as peace and war are intimately linked up with ideas on the structure of the international society and the motive powers behind it. Naturalist writers indicate their attitude towards these problems in their abstractions from political reality, and, as in our own time, the *is* and *ought* are not always neatly separated from each other. Reality and utopia often are

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amalgamated in the picture of the state of nature drawn by these thinkers. Whether the "natural condition of mankind" is depicted in darker or brighter colors depends on the pessimistic or optimistic, or, if preferred, on the "realistic" or "idealistic" outlook of each individual philosopher. Correspondingly, the emphasis changes from war as the natural state of relations between States to peace as "a state most highly agreeable to human nature."¹

Hobbes and Pufendorf are typical representatives of the two schools of thought. In Hobbes' *Elements of Law* is a passage which gives the quintessence of his view:

Seeing then to the offensiveness of man's nature one to another, there is added a right of every man to everything, whereby one man invadeth with right, and another with right resisteth; and men live thereby in perpetual diffidence, and study how to preoccupate each other; the estate of men in this natural liberty is the estate of war. For war is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared; and the time which is not war, is peace.²

The opposite thesis finds equally firm upholders and may be illustrated by a quotation from Pufendorf's *De Jure Naturae et Gentium Libri Octo*:

Now it is one of the first principles of natural law that no one unjustly do another hurt or damage, as well as that men should perform for each other the duties of humanity, and show especial zeal to fulfil the matters upon which they have entered into particular agreements. When men observe these duties in their relations one with another, it is called peace, which is a state most highly agreeable to human nature and fitted to preserve it, the creation and preservation of which constitutes one of the chief reasons for the law of nature being placed in the hearts of men.³

It does not seem accidental that the earlier naturalists were more impressed by the reality of the *bellum omnium contra omnes* than by the utopia of the *civitas maxima*. In the early period of absolutism, the Leviathans found themselves involved in a continuous struggle for survival both on the internal and external fronts. The absolutist States were not yet strong enough for the grand strategy which required the compact units of greater Powers, backed by a mercantilist system of economics and taxation as well as by standing armies of considerable size. They were not yet too weak to rely on big and decisive strokes. The undefined medley of war in peace provided the congenial atmosphere for the young absolutist State in its fight for survival and preponderance.⁴ It, therefore, was only logical that Grotius entitled his main work *De Jure Belli ac Pacis Libri Tres*;

for war appeared to him as the all-inclusive and over-riding phenomenon: "There is no controversy which may not give rise to war."⁵

Thus, war occupies the central position in the systems of the early naturalists. This statement, however, is open to the challenge that it unduly minimizes the intentions of these writers. As it is commonly held, their aim was to limit the horrors of war and, as seems to follow from their doctrines on the *bellum justum*, to limit the resort to war. The requirement of a *causa justa* appears to suggest that the normal state of affairs between States is one of peace, departure from which is merely permissible in clearly defined cases. Insofar as the intentions of any writer are concerned, it is hard to furnish convincing proof for any thesis. It might, however, be relevant to bear in mind that most international lawyers of that period did not have a merely academic interest in international law nor were they the equivalent of modern pacifists. They were "men of the world," and a good many of them were actively engaged in diplomacy or held honorable and honored posts as legal advisors to the very princes whom they were supposed to subject to the rule of law. Furthermore, all of them alike were only too anxious to see their legal propositions accepted by State practice. It, therefore, would presuppose a childlike naïveté or a saintly character on their part to assume that they either were completely unaware of the power reality surrounding them or of the concessions which had to be made to make their systems acceptable to the powers that be. Yet such considerations can and should not do more than to neutralize the current story-book version of the early history of international law. Quite apart from the laudable or deplorable intentions of their creators, doctrines must be judged on their own merits and by the functions which they fulfil in the reality of society. Once they have been propounded, they live a life of their own, and the uses to which they are put depend on social forces beyond the control of their authors.

The Ideology of the *Bellum Justum*

The two main problems around which naturalist thinking on war centers are well brought out in Gentili's definition of war as *publicorum armorum justa contentio*.⁶

The conception of war as a *public* contest merely put into legal form the object of absolutist policy to achieve and to hold the monopoly of legitimate physical force. The memory of the Middle Ages when vassals waged their private wars against their overlords, and the central authority merely attempted to limit these feuds, was still fresh in the early days of the absolute State. It, therefore, could not be asserted too often that any form of civil war was essentially

different from the wars waged between sovereign princes and was, in Bacon's words, "like the heat of a fever."⁷ The intellectual support thus rendered to the cause of absolutism could only recommend the doctrine of the *bellum publicum* to the rulers of absolutist States. In this light, the insistence of naturalist writers on the need for a declaration of war receives a new meaning. Sovereigns did not so much consider this prerequisite of a just war as a burdensome limitation of their freedom of action, but as a golden opportunity of transforming their *de facto* monopoly of physical force into a *de jure* monopoly. The duty of the prince to guard the community against the danger of illegal war was bound to strengthen his claim to undisputed and exclusive authority in matters of peace and war. Duty implies competence, and competence has a tendency towards exclusiveness. This aspect of the matter is strongly stressed by Victoria: "Such a State, then, or the prince thereof, has authority to declare war, and no one else."⁸ Once the absolute State was firmly established, other considerations induced sovereigns to forget only too soon this solemn obligation for a declaration of war and the requirement fell into general disuse.⁹ Thus, State practice could accept without reservation the plea of the naturalist for the outlawry of private war. They were, however, supposed to consult "the good and the wise"¹⁰ on the prerequisites of *bellum justum*. What advice had the fathers of international law to offer? It is proposed to limit this examination to Gentili, for, with insignificant exceptions, his catalogue of *causae justae* is typical of the naturalist approach to this problem.¹¹ It seems only fair to select this distinguished Oxford professor of Italian extraction as modern jurists claim for him that he was the first to place the subject of war on a non-theological basis¹² and that his grasp of the doctrine of the *bellum justum* was even firmer than that of Grotius.¹³

According to Gentili, the first group of just wars is provided by defensive wars. They include what he charitably terms wars waged for reasons of expedient defence: "A defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible."¹⁴ It seems as if this all-embracing formula were enough to satisfy the most extreme adherent of the reason of State. Yet, obligingly, Gentili does not stop at this point. He proceeds to elaborate the grounds which justify even offensive wars, and he classifies them under the headings of honor, necessity and expediency.¹⁵ In the case of an alliance, a prince is justified in coming to the assistance of his ally as long as he is convinced of the justice of his ally's cause. If treaty obligations should prove to be incompatible with each other and both cases happened to be equally just, "preference should be given to the one who has priority."¹⁶ Should his disciples still feel any qualms of conscience as to the "justice" of their contemplated war, Gentili provides further

arguments which even the most scrupulous or least gifted adept of power politics could hardly fail to perceive. These considerations are derived from the conceptions of subjective and relative justice. A sovereign may be engaged in an unjust war, but he may be wrongly under the impression that his cause is just. This, Gentili considers enough to exonerate a prince, though the unfortunate consequence of such liberalism may be that "in nearly every kind of dispute neither of the two disputants is unjust."¹⁷ Finally, a State may have a cause which, relatively, is less just than that of its opponent. But in this case it must be remembered that "one man does not cease to be in the right because his opponent has a juster cause."¹⁸ Thus, "invincible ignorance," as Victoria has called this state of mind,¹⁹ is the best keeper of a king's conscience, if he wishes to rule in accordance with the precepts so ably set out by Machiavelli but equally feels bound to engage exclusively in "just" wars of a "defensive" or "offensive" character.

In these circumstances, a naturalist may be forgiven for not always bearing in mind his own subtle distinctions and for bluntly stating that "by the consent of nations a rule has been introduced that all wars, conducted on both sides by authority of the sovereign power, are to be held just wars."²⁰

It accordingly seems that there is little substance in the time-honored assertion that the naturalists have subjected war to law, and that rather cynical disregard of these norms by State practice merely amounts to regrettable violations of clearly defined standards. It very much looks like special pleading to retort that sovereigns paid their respect at least in form to these rules when they attempted to justify their wars of interest in terms of doctrine of the *bellum justum*. In effect, this did not mean that war was subordinated to natural law, but that natural law was made subservient to the reason of State. In an international society in which the rulers of States are only responsible to their own conscience, an elastic theory with as many loopholes as the doctrine of the *bellum justum* was bound to degenerate into a mere ideology serving the interests which it was supposed to control. Had the naturalists insisted on more rigid standards, their teachings would have been ignored or interpreted out of existence. As, in accordance with their "realistic" outlook, they were prepared to come to terms with the powers that be, their theories could be turned to useful purposes. As Machiavelli reflects, "the people will complain of a war made without reason."²¹ Consequently, rulers are well advised not to ignore their home front, and this is the more necessary the wider awake public opinion and conscience happen to be. It is equally necessary to break the spirit of the enemy

and to mobilize opinion in neutral countries. What could better serve this purpose than a foolproof case regarding the justice of one's own cause? In the field of intellectual warfare, which is not a twentieth century invention, the authority of a Victoria, Gentili or Grotius is worth a good many cannons and battalions, and, as has been shown, it was futile to attempt to apply their doctrines in accordance with the requirements of power politics. The implications of these theories, however, were still more far-reaching. The naturalists conveniently lent their authority to the thesis that some rather disconcerting passages in the Gospel on war were not to be taken too literally, and that war, provided that it was just, was authorized both by divine and natural law.²² Thus, seemingly, the naturalists consider war as an exceptional remedy. They do so, however, in a manner which does not actually hamper the actual supremacy of force in the international society, and they provide Statesmen with an ideological cover, highly appreciated in ages characterized by glaring gaps between the religious and ethical standards of individual morality and the requirements of power politics.²³

The conclusions reached so far may be summarized as follows: The naturalists derive their conceptions of peace and war from their vistas of the structure of international society either by abstractions from reality or by wishful speculations on human nature. For the "realistic" school of naturalists, war is the over-riding phenomenon, and peace can be defined only negatively by reference to war. The object of the "idealistic" school of naturalists to limit war to an exceptional remedy is frustrated by their own casuistry. It deprives the doctrine of the *bellum justum* of objective criteria between just and unjust wars and invites subjectivism and abuse by State practice. Thus, their doctrine degenerates into a mere ideology of power politics. The insistence of naturalist writers on the element of *bellum publicum* in their definitions of war corresponds to the interests of rising absolutism, as does their postulation for a declaration of war. Therefore, during the period of early absolutism this part of their doctrine meets with the full approval of State practice.

Peace and War in the Modern Doctrine and Practice of International Law

The modern approach to the problem of peace and war is a medley of doctrines and assumptions. They may be discussed under three headings: The doctrine of the normality of peace, the doctrine of the alternative character of peace and war, and the doctrine of war as a status and objective phenomenon.

The doctrine of the normality of peace and the functions of war. In the leading treatises on international law, the order of things, as it appeared to the naturalists, is reversed. *Jus Belli ac Pacis* is boldly transformed into *Jus Pacis ac Belli*. It is mostly taken for granted that peace is the normal state in international relations. Only exceptionally a writer condescends to state in so many words this "self-evident" assumption. Phillimore, in his *Commentaries upon International Law*, does so with commendable clarity: "We have hitherto considered States in their normal, that is, their pacific relations to each . . . other. We have now to consider the abnormal state of things which ensues upon a disturbance of these normal relations, when these rights have been invaded and these obligations not fulfilled."²⁴

Actually, such an assertion implies views and judgments on the nature and functions of war which are far from being self-explanatory. As has been shown before, the naturalists found their solutions of these problems by means of abstractions from reality or deductions from human nature. Modern writers who enjoyed the deceptive security of a stable balance of power system as it existed between 1815 and 1914, might have held with some justice that they, too, had drawn the obvious conclusions from their era of peace. For a generation which has witnessed two World Wars in its lifetime, the assumption of peace as the normal state of international relations is much more problematical. In a system of power politics, war is not an unhappy incident or an incalculable catastrophe, but the culminating point in a rising scale of pressure, the last resort of power politics when diplomacy fails to achieve its objects by the threat of force or the application of less drastic forms of pressure.²⁵ Thus, this doctrine is founded on a complete misinterpretation of the functions of war in modern international society.

A good many writers have tried to avoid the real issue by remarkable feats of escapism. Over and over it has been repeated that war is an event,²⁶ a question of fact,²⁷ or "an international fact in the first degree."²⁸ If this meant that war is legally irrelevant, it would prove rather too much; for it would imply that international law is not capable of dealing with legal problems arising out of war. Rightly, this conclusion is not drawn by international lawyers. This classification of war may mean, too, that war entails legal consequences, but is not capable of legal control.²⁹ To prove this is the avowed or implied object of those who interpret war as akin to revolution or as an emergency agency of change. How could a legal system attempt to control revolution or effect far-reaching changes without elaborate legislative organs in which clearly international law is so utterly lacking? As, however, the need for revolution or sweeping changes is only apparent in exceptional circumstances, peace may still be considered to

be the state of normality in the inter-State system. By the opposite procedure, others arrive at the same result. They assert that war is not at all incompatible with international law, but comparable to legal institutions such as self-help, the right of action, something like the sanction or law of procedure by means of which the law of peace is realized.³⁰

It should not be denied that, in certain circumstances, war is an agency of self-help and of the violent adaptation of international society to fundamentally changed conditions. Yet it would be highly unrealistic to maintain that these are the only or even the main functions of international law. The functions of war are as manifold as the objects of power politics.

Thus, it appears that neither the self-denying classification of war as a fact nor the *ad hoc* sociology of international lawyers can furnish proof for the thesis that peace is the normal state in international law and relations. In the idealistic variety of naturalist doctrine, the primacy of peace was logically assured by the concept of the *bellum*. If modern doctrine were consistent, it would have to derive its assertions regarding the normal or exceptional character of peace and war from the detached observation of the reality of international relations. The actual fluctuations between periods of peace and war do not seem to justify a doctrine of the normality of peace.³¹ This assumption, therefore, is nothing more than a lingering relic of naturalist philosophy on the nature of man.

The doctrine of the alternative character of peace and war and the reality of State practice. In the systems of naturalist writers, this doctrine is perfectly understandable. As they keep reprisals within very narrow limits, and jural war depends on a *causa justa*, "War and peace are correlatively opposite, and what is said affirmatively of the one is said negatively of the other."³² Thus, Grotius can quote Cicero with approval: "*Inter bellum et pacem nihil est medium.*"³³ It should not, however, be forgotten that even amongst naturalists this doctrine was not upheld with unanimity. In the words of Pufendorf,³⁴ "some states more expressly denote a relation toward other men than do others, since they signify distinctly the mode in which men mutually transact their business. The most outstanding of these are peace and war."

In view of the fact that modern doctrine does not and can not insist on a just cause as a condition of legal war, and State practice has made extensive use of military reprisals, pacific blockades, and similar devices, the proposition of the alternative character of peace and war as part of modern international law³⁵ requires to be proved to be believed. It may claim to be in accordance with the practice of English courts.³⁶ Their view may be summarized in the words of Lord Macnaghten in *Janson v. Driefontein Consolidated Mines, Ltd.*: "The law

recognizes a state of peace and a state of war, but . . . it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace or war.”³⁷ This statement, however, must be read in its context which indicates the reason for the rigid adherence of English courts to the doctrine of the complementary character of peace and war. It follows from the general attitude taken by English courts regarding vital issues of foreign affairs affecting this country. These matters are within the prerogative of the Crown, and “it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. . . . If and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects.”³⁸ This practice is not derived from the scrutiny of positive international law, but is based on a division of functions between the judiciary and the executive, considered desirable from the point of view of English law, and it gives expression to the legitimate concern of courts for the certainty of their municipal law. It is, therefore, impossible to derive from this practice any conclusions regarding the validity of the doctrine of the alternative character of peace and war as a doctrine of international law.

As in the case of the doctrine of the normality of peace, this doctrine could derive its only justification from State practice. The foreign relations of all great Powers contain frequent instances of resort to armed force short of war or, as they are sometimes called, of “pre-belligerent acts.”³⁹ Military interventions and reprisals, material guarantees and pacific blockades have become such household terms of power diplomacy and modern treatises on international law⁴⁰ that it suffices merely to refer to them in order to indicate the problematic character of the alternative between peace and war. It cannot be doubted that these measures are “tinged with a hostile character”; it is admitted that they are “often but the train which awaits only a spark to be kindled into the full blaze of open war.” Yet it is still asserted that they are “not in themselves inconsistent with the maintenance of peace.”⁴¹ Arguments to the effect that such measures merely constitute an abuse of force and amount to war in disguise may be successful in some instances.⁴² They do not, however, offer a satisfactory explanation of all or even the greater majority of these cases. It is hard to see how the limited application of force can amount to war if not only third States but also the State against which these measures are taken insists on the continuation of peaceful relations with the State resorting to a limited use of armed force. The current explanation that, by customary international law, these measures have been incorporated into the law of peace, is correct if it means that resort to armed force short of war may be lawful in certain circumstances. Yet how can

writers who take this line square with their contention the attitude of third States in those cases in which they insist on the application of the laws of neutrality to their own relations with the contending States, while the latter insist on the continuance of a state of peace between themselves?⁴³ This view leads to the paradoxical conception of neutrality in time of peace, not a very pleasant constellation for the followers of the doctrine of the alternative character of peace and war. This doctrine and the reality of measures short of war can be reconciled only at the price of depriving the state of peace of all positive criteria and of reducing it to a merely negative status.⁴⁴ To see peace and war in their proper perspective, it is necessary to analyze these states against the background of the reality of power politics which is the over-riding phenomenon in international affairs.⁴⁵

Powers are in a state of peace with each other when they are prepared to apply to their mutual relations the extensive system of legal rules which is characterized, e.g., by respect for territorial sovereignty, the freedom of the high seas and the exclusion of the use of armed force. In effect, this means that States are willing to exercise in their relations merely political and economic, but not military power.⁴⁶

Powers are in a state of war with each other and of neutrality towards third States, if, subject to customary and treaty limitations, they choose to apply against each other Power to the utmost, i.e., military as well as political and economic power.

Modern States in their practice have merely drawn their own conclusions from the complete breakdown of the doctrine of the *bellum justum* when they consider themselves free not only to change over at will from a state of peace to a state of war, but also entitled to the liberal use of limited force.⁴⁷ It is characteristic of this state that it does not necessarily lead to the comprehensive use of power, as in case of war. Whether the state of peace continues with the State against which limited force is applied or not, depends on the latter's decision. Similarly, it is left to third States to decide for themselves whether, in their relations with the contending States, they prefer the laws of peace or neutrality. Even if all States directly and indirectly concerned acquiesced in the limited use of force, it appears to be a misnomer to call such a *pax bellicosa* by the name of peace. It is equally unwarranted to call war a state in which both contending States insist on the continuation of their peaceful relations, merely because third States wish to apply the law of neutrality during such a *bellum pacificum*. These constellations are incompatible with the states of peace and war; they constitute a state of their own, a *status mixtus*.

Equally scant respect was shown by State practice to the conception of the *bellum publicum*. Since the beginning of the 19th century,⁴⁸ States have insisted on their right at their discretion to recognize revolutionaries as belligerents, and, on less firm ground,⁴⁹ as insurgents if the insurrection amounted to a civil war. Thus, again, State practice found it necessary to build a half-way house, this time between the unreserved application of the principle of non-intervention in the domestic affairs of other States and the recognition of the insurgent government as the government of a sovereign State, a measure considered to be illegal during a civil war. If the government against which the revolutionary movement is directed itself recognizes the belligerency of the insurgents, third States are usually inclined to accept the position of neutrals in the contest.⁵⁰ If, however, that government is unwilling to do so, it is left to third States to decide for themselves whether they wish to ignore the civil war or elevate it into war proper by the recognition of the insurgents as belligerents. Thus, we are confronted with another typical instance of the *status mixtus*; at their discretion, States may consider one and the same phenomenon as a domestic affair, compatible with a state of peace, or as war.

The conclusion seems unavoidable that, as in the case of the doctrine of the normality of peace, the doctrine of the alternative character of peace and war cannot stand the test when confronted with State practice. It should be discarded as an uncritically accepted remnant of a now merely historically relevant naturalist approach to the problem of peace and war.

The doctrine of war as a status and objective phenomenon. Attempts at defining war in modern doctrine are dominated by Grotius' definition of war as a status or condition: "War is the condition of those contending by force, viewed simply as such."⁵¹ The emphasis on the status of war as the alternative to that of peace is congenial to medieval thinking and there finds its legal expression in the *diffidatio*, the message of defiance which severs the tie of faith between him who sends it and him who receives it.⁵² This conception of war as a status equally fits into the naturalist scheme, as naturalist writers consider peace incompatible with the use of armed force between States. Apart from special treaty obligations, modern doctrine, however, cannot rely on the certainty of a declaration of war as an equivalent to the old *diffidatio*, and, in the face of contrary State practice,⁵³ cannot assert a customary rule requiring a declaration of war. Whether, in these circumstances, insistence on war as a status means anything depends on the capability of modern doctrine to find an objective criterion defining war as distinct from peace and the *status mixtus*.

If modern writers were consistent, they would have to remember in their definitions of war their own assumptions of peace as the normal state and of the alternative character of peace and war. Such consideration for their own doctrines would necessarily lead them to a definition of war by reference to peace. Yet this would be too much to expect. The best of which modern doctrine seems capable in relating war to peace is contained, albeit only on the index, in a leading textbook: "Peace: see Termination of War."⁵⁴

Commonly, war is defined as a contention of States through their armed forces for the purpose of overpowering each other.⁵⁵ At first sight, the element of the definition, *contention of States through their armed forces*, appears to offer an objective criterion of distinction between the states of peace and war. Even if this could be granted, this definition could not be regarded as adequate, as it does not cover two types of war. States, geographically widely separated, may declare war against each other and apply the laws of warfare (confiscation of property belonging to the enemy State, internment of enemy aliens, etc.) in their mutual relations without being able to bring about a contention between their armed forces. Or, a State which is at war may deem it prudent to withdraw its armed forces in such a way that, again, there is no opportunity for the required contention between the armed forces to occur. Instances of the first class are provided by the relations between South and Central American States and the Central Powers in the First World War and by corresponding situations in the present world war. An example of the second type is offered by the Bulgarian withdrawal before the Rumanian troops in the Second Balkan War.

Yet a still more serious flaw of this definition consists in its inability objectively to indicate the borderline between war and the *status mixtus*. States may contend through their armed forces, but, as in the case of the extensive battles between Russian and Japanese troops on the frontier between the U.S.S.R. and Manchukuo, may be unwilling to consider such acts as a state of war. Thus, this definition either amounts to the assertion that States are at war with each other against their own will, or these cases have to be distinguished from war by the introduction into the definition of a subjective element, the *animus belligerendi*.⁵⁶ Modern doctrine usually chooses this latter alternative as the minor evil. This, however, means that not much is left of the so highly coveted assumption of the alternative character of peace and war and of the apparently objective criterion of the contention of States through their armed forces. The acceptance of the *animus belligerendi* reduces the current definition of war to the truism that States contending with each other through their armed forces are at war with each other if they want to be at war with each other. If one of the contending States unmistakably expresses its will, the status of war is

created. If, however, the belligerents fail to do so, third States are free to interpret at their own discretion the legal significance of "a contention of States through their armed forces."

This failure of modern doctrine is not the fault of individual writers. It is due to the impossibility of achieving what modern theorists attempt to do. In a system of international law which admits the limited use of force to its law of peace, or in which there are more than two states of legal relationships as pointed out in this article, it is impossible to find an objective criterion which distinguishes the status of war both from the status of peace and from the *status mixtus*.

In these circumstances, all that can be said is this:

Declared war creates the status of war between the States directly concerned and with regard to third States.

Measures taken within the purview of the *status mixtus* and of undeclared war automatically create a state of war between the States directly concerned, and of neutrality with regard to third States, only if the State against which these measures are taken, or undeclared war is waged, chooses to consider such action as amounting to war. In the absence of an unequivocal declaration to this effect, third States are free to decide for themselves whether they wish to regulate their relations with the contending States in accordance with the law of peace or the law of war.

Thus it appears that, when faced with the concrete task of defining war, modern doctrine has to disregard its own assumptions of peace as the normal state and of the alternative character of peace and war. The current definition of war is incomplete and only seemingly objective. The express or implied inclusion in this definition of the *animus belligerendi* either amounts to the implicit admission of the *status mixtus* which is determined by intentions rather than acts, or to the unavoidable acceptance of a *continuum* between peace and war which reduces peace to a merely negative status. If the laws of neutrality are applied in a state which the "belligerents" consider to be peace, or those of warfare in a state which third States regard as peace, this means that there is no intrinsic difference between the states of peace and war. The application of the laws of peace and war becomes a question of consensus amongst the States directly and indirectly concerned.⁵⁷ Doctrine based on State practice does not and cannot provide objective tests regarding the circumstances in which the different sets of rules are to be applied, and the practice of power diplomacy is not a promising field in which to look for the initiative in the precise separation of measures where the choice is mainly a question of expediency.

It appears, therefore, that none of the assertions of the modern doctrine on peace and war can be upheld.

The doctrine of the normality of peace is merely a survival of naturalist thought, but is incompatible with the real functions of war in modern international society.

The doctrine of the alternative character of peace and war, of the same naturalist origin, minimizes or ignores the reality of State practice which has created rules pertaining neither to those of peace or war, but constituting a *status mixtus*.

The doctrine of war as a status and objective phenomenon breaks down over the reality of the *status mixtus*. This status is not separated from those of peace and war by any objective tests. States contend by power in peace and war. In the state of peace, they are limited to the use of economic and political power. In the *status mixtus*, they supplement these forms of power by the use of military power. In the state of war, they use all available forms of power. It betrays an over-estimation of the difference between political and economic power as compared with military power, to imagine that, within a system of power politics, there is any qualitative difference between the states of peace and war.

The traditional division of international law into the law of peace and the law of war may be expedient for didactic purposes. The necessary subjectivity, however, of the available criteria of distinction between the two, or better three, states of typical legal relations between States deprives this classification of any claim to scientific sacrosanctity.

The Distinction between Peace and War in International Conventions

To round out the picture, it seems worthwhile to examine whether the conclusions reached so far are affected by relevant international conventions. If States had desired to create a clear borderline between peace and war, they could have achieved this object only at the price of renouncing their claim to the use of force in time of "peace." Then war and the use of armed force would have become identical, and a clearly discernible criterion of war would have become available. This truly objective test was used in the Second Hague Convention of 1907 regarding the Limitation of the Employment of Force for the Recovery of Contract Debts. Nevertheless, the Powers represented at the Second Hague Peace Conference were not prepared to abolish the *status mixtus* as such. This became embarrassingly evident in the discussions of the second sub-committee of the Second Commission when the Chinese military delegate analyzed the proposed Convention on Compulsory Declaration of War in the

light of the then recent Boxer expedition, and suggested a clear definition of war.⁵⁸ In the words of a contemporary writer, “no one replied to these embarrassing questions. Governments are not loath to have the definition of what constitutes war shrouded in mystery; for in the greater number of States possessing a parliamentary form of government, the decision to make war is hedged about with formalities and special constitutional requirements, and governments have in the past and are likely in the future to find it convenient for reasons of domestic and foreign policy to resort to measures of war while maintaining that no war exists.”⁵⁹ Thus, again, the term “hostilities,” which is used in this convention, really means acts of armed force carried out with the intent of war, and the door is kept wide open for undeclared war developing out of measures taken within the purview or under the cover of the *status mixtus*.⁶⁰

Equally instructive are the attempts made in the post-1919 period to distinguish between legal and illegal wars. In the Covenant of the League of Nations, terms such as war, threat of war, resort to war and acts of war are freely used. This question has received so much attention⁶¹ that it only seems necessary to emphasize the aspects particularly relevant to our discussion.

President Wilson’s drafts make it obvious that he was fully aware of the dangers threatening his scheme if the *status mixtus* should be allowed to survive. Article VII of his various drafts runs as follows:

If any Power shall declare war or begin hostilities, or take any hostile step short of war, against another Power before submitting the dispute involved to arbitrators as herein provided, or shall declare war or begin hostilities, or take any hostile step short of war, in regard to any dispute which has been decided adversely to it by arbitrators chosen and empowered as herein provided, the contracting parties hereby bind themselves not only to cease all commerce and intercourse with that Power but also to unite in blockading and closing the frontiers of that Power to commerce or intercourse with any part of the world and to use any force that may be necessary to accomplish that object.

Yet, in the course of the drafting, Wilson’s attempt seriously to curb power politics was quietly undone and his formulations were replaced in a matter-of-course way by the traditional terminology—“minor changes . . . of an entirely trivial character.”⁶²

Further support to the view that war in the meaning of the Covenant was limited to war in the technical sense, was given by the equivocal treatment of the Corfu incident in League quarters and, particularly, by the sibylline report of the Committee of Jurists on this matter.⁶³

The evasive attitude taken by the members of the League towards the war between Bolivia and Paraguay,⁶⁴ and still more so towards the "war in disguise"⁶⁵ in Manchukuo, led to a situation in which illegal war under the Covenant was limited to cases in which the members of the League were prepared to say so.⁶⁶

Similarly, the use of the term "war" in the Kellogg Pact enables States to exercise their full discretion in deciding whether the use of armed force by a State or even contentions of States through their armed forces are to be considered as wars within the meaning of the pact.⁶⁷ Furthermore, the United States Secretary of State himself thought it necessary to affirm in the correspondence preceding the conclusion of the pact that each signatory alone would be "competent to decide whether circumstances require recourse to war in self-defense."⁶⁸ Thus, again, illegal war was limited to armed contentions between States which the signatories cared to consider as such.

State practice went still further in its obliteration of the few distinguishing marks that were left between peace, the *status mixtus* and war. If, in the case of a measure taken within the *status mixtus*, a State is free to consider such a step as an act of war, it can in advance sign away its discretion to exchange the *status mixtus* for that of war. Thus, it is stipulated in the Treaty of Versailles⁶⁹ that measures which may include military reprisals⁷⁰ should not be regarded by Germany as acts of war. A similar clause is contained in the Hague Agreements of 1930.⁷¹ In the declarations exchanged January 20, 1930, Germany acknowledges that, in case of an intentional default, "it is legitimate that, in order to ensure the fulfillment of the obligations of the debtor Power resulting from the New Plan, the creditor Power or Powers should resume their full liberty of action."

Yet even this use of the freedom of contract was surpassed by the self-contradictions of the appeasement period. On the one hand, the Powers assembled at Nyon upheld the fiction that the Spanish War was not an international war and most of those States refused to grant recognition as belligerents to the insurgents. On the other hand, they did not base the Nyon Agreement on the obvious inadmissibility of sinking foreign merchantmen in time of peace. In order to enable the totalitarian aggressors to save their faces, they assimilated these acts of illegal intervention to piratical acts by submarines and aircraft of unknown Powers and arraigned the "pirates" for their violations of Part IV of the Treaty of London of 1930, *i.e.*, rules applicable in time of war between sovereign States.⁷²

It cannot, therefore, be maintained that the multilateral agreements concluded in pre-1914 days and during the era of "power politics in disguise" have

contributed to the establishment of more solid criteria of distinction between peace and war. If anything, they have increased the tendency towards subjectivism and an unscrupulous abuse of terms. This was the unavoidable result of a "statesmanship" which, while insisting on unlimited sovereignty, felt bound to make paper concessions to popular demands incompatible with any system of power politics.

Programme for a Sociology of International Law

It would by far overstep the limits of this article adequately to develop the tests by which a scientific analysis of international law would have to proceed. In order, however, not entirely to limit these observations to criticism which, of necessity, must be destructive, it may be permitted at least to outline the constructive task.

The starting point must be the fundamental sociological distinction between society and community and a realization of the essentially different functions fulfilled by society and community laws.⁷³ It depends on the degree to which a society has integrated into a community, whether and to what extent: (1) law can develop its typical function of providing rational rules for the conduct of the members of the group, or this purpose is frustrated by the overriding power of "over-mighty subjects" within a group; (2) it can and must be authoritatively determined by persons appointed for this purpose and can be enforced against recalcitrant members.

A comparison between typical social laws, such as the laws imposed by conquerors or colonial Powers in the early stages of imperialism, with the rules governing relations such as marriage, blood brotherhood or religious communities, indicates the two extreme poles. Ultimately, the one is a law of power and the other a law of coordination. In the one, power, and, in the other, the common task,⁷⁴ is the decisive factor. Yet actual life seeks compromises between such extremes and "pure" types of law. Power must be limited even in the interest of those who wield it. Men obey better if they obey the rule of law and not the rule of men. They have an innate vision of justice. What kind of justice will be meted out to them depends on the character of the group in which they live and on the scope of the value consciousness of their own time. The constant trend, however, in any legal system which aims at an approximation to justice inevitably appears to be toward reciprocity. If a certain minimum of reciprocity is realized, the power behind the law has a tendency to become invisible. This situation seems to correspond to the typical make-up of human nature. Man is not predominately altruistic, but is prepared to act on the basis of the principle

Do ut des, to consider the application of this principle to his own affairs as fair and just, and to come to an understanding with his fellowmen on the standards by which the *quid pro quo* is to be determined. In exceptional circumstances, man is prepared to give more than he takes. This may be due to inferiority of power or to mistake and fraud. Then, reciprocity is achieved merely in a formal sense. In the first case, the lacking equivalent is made up by the awareness of the hypothetical situation in case agreement had not been achieved or the law of power had not been obeyed. In the second case, reciprocity is assumed but does not exist in reality. These two examples represent typical social constellations. The willingness to forego actual reciprocity may, however, also be due to a voluntary self-limitation and self-denial, when reciprocity in a spiritual sense is achieved by the consciousness of such sacrifice and its acknowledgment by the community. Thus, power, reciprocity and coordination seem to be the three constant elements of law, and the preponderance of one or the other appears to depend on the type of the group in which law fulfills its specific functions.

International law is a typical social law and a type of social law which does not condition, but is conditioned, by the rule of force.⁷⁵ Therefore, it is hard to conceive a more unrealistic assumption than the one which is the basis of the modern doctrine of international law: the normality of peace. The state of peace, as it exists between major wars, is nothing but the interval between the dynamic periods in which previous systems of power politics undergo a process of confirmation or transformation. The peace treaties of Westphalia, Vienna and Paris are the *Magnae Cartae* in which the hierarchy of power achieved during the wars preceding them has been continuously redefined. As peace is the result of force, it requires force to uphold the statics of any peace interval. This means that the same Power which has won the war must maintain the peace after the war. Therefore, within a system of power politics, there cannot exist any intrinsic difference between peace and war.

This explains why the law of peace contains so many rules directly related to the maintenance and justification of power politics in general and of specific systems of power politics established as the result of major wars. The functions of such rules are primarily those of an ideology. Norms such as title by conquest for the acquisition of territory, or the exclusion of duress as a ground for invalidating a peace treaty, are in a different category, as compared with those on the three-mile limit or on diplomatic immunity. They are still more different from those which govern the work of the International Commission for Air Navigation or the organization for the International Anti-Drug Campaign. The first category is representative of the law of power, congenial to an international

society which is founded on the arbitrament of force. The second stands for the law of reciprocity which governs the relations of States in spheres irrelevant from the point of view of power politics and in circumstances when threat of force is no longer effective because States have already resorted to the ultimate means of pressure. The third gives a timid expression to that law of coordination which can only find its realization in an international community proper.

It is suggested that the analytical and descriptive work of past generations must be supplemented by a sociological analysis of international law as a law of power, reciprocity and coördination, and correspondingly as an ideology, reality and utopia.

Notes

1. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (1688), Bk. VIII, Ch. VI, 2. (English translation in Carnegie Endowment edition, Oxford, The Clarendon Press, 1934.)

2. Pt. I, Ch. 14, II; similarly in his *LEVIATHAN*, Ch. 13. See also PLATO, *THE LAWS*, Bk. I, 2; PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1563), Pt. I, Ch. I, I; SPINOZA, *TRACTATUS POLITICUS* (1677), Ch. 2, § 14 and Ch. 3, § 13. This conception lies at the bottom of the distinction in Muslim law between the "Abode of Islam" and the "Abode of War." Cf. M. KHADDURI, *THE LAW OF WAR AND PEACE IN ISLAM* (London, 1940), pp. 20 and 46.

3. *Loc. cit.*; see also *ibid.*, Bk. II, Ch. II, 7 or his *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO* (1673), Bk. II, Ch. XVI, I (Carnegie Endowment translation, New York, 1927), and the dictum in *Miller v. The Resolution*, U.S. Court of Appeals (1781), 2 Dallas 1: "As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society."

4. Cf. F. Meinecke's masterly description of the political background of this period in *DIE IDEE DER STAATSAISON IN DER NEUEREN GESCHICHTE* (Munich, 1929), p. 514 *et seq.*

5. Bk. I, Ch. I, I. (English translation in Carnegie Endowment edition, Oxford, The Clarendon Press, 1925.)

6. *DE JURE BELLI LIBRI TRES* (1589), Bk. I, Ch. II (Carnegie Endowment translation, Oxford, The Clarendon Press, 1933.)

7. In his essay, *Of the Greatnesse of Kingdomes and Estates* (1597), XXIX.

8. *DE INDIS ET DE JURE BELLI RELECTIONES* (1541), *Relectio Secunda*, No. 7 (Carnegie Institution translation, Washington, 1917). See also GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, Bk. III, Ch. 3, II.

9. Cf. SIR TRAVERS TWISS, *THE LAW OF NATIONS* (Oxford, 1875), Vol. II, p. 65.

10. VICTORIA, quoting from Terence, *loc. cit.*, No. 21.

11. Useful surveys of this doctrine are contained in R. REGOUT, *LA DOCTRINE DE LA GUERRE JUSTE* (Paris, 1935), and W. BALLIS, *THE LEGAL POSITION OF WAR* (The Hague, 1937). See also J. von Elbe, *The Evolution of the Concept of the Just War in International Law*, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 33 (1939), p. 665 *et seq.*

12. T. E. HOLLAND, *STUDIES IN INTERNATIONAL LAW* (Oxford, 1898), p. 58.

13. C. Phillipson, introduction to *GENTILI'S DE JURE BELLI LIBRI TRES* (Carnegie Endowment translation, Oxford, The Clarendon Press, 1933), Vol. II, p. 33a.

14. GENTILI, *ibid.*, Bk. I, Ch. XIV.
15. *Ibid.*, Chs. XV, XVII, and XVIII.
16. *Ibid.*, Bk. III, Ch. XVIII.
17. *Ibid.*, Bk. I, Ch. VI.
18. *Ibid.*
19. *Loc. cit.*, No. 32.
20. GROTIUS, *loc. cit.*, Bk. II, Ch. 17, S. 19.
21. THOUGHTS OF A STATESMAN, Ch. II.
22. E.g., VICTORIA, *loc. cit.*, introd. Compare with this approach Erasmus' *QUERELA PACIS* (1517).
23. For a more detailed analysis, see the present writer's *POWER POLITICS* (London, 1941), p. 153 *et seq.*
24. Vol. III (London, 1885), p. I. See also C. PHILLIPSON, *THE EFFECT OF WAR ON CONTRACTS* (London, 1909), p. 25; Anonymous, *The League of Nations and the Laws of War*, B.Y.I.L., 1920-1921, p. 109 *et seq.*; A. P. Higgins, *The Law of Peace*, *ibid.*, 1923-1924, p. 153 *et seq.*; SIR JOHN FISCHER WILLIAMS, *CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS* (London, 1929), p. 73 *et seq.*
25. For a more detailed discussion of the functions of war in modern international society, see the writer's *POWER POLITICS*, *supra*, p. 132 *et seq.*
26. Cf. Q. Wright, *Changes in the Conception of War*, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 18 (1924), p. 756.
27. See G. J. WEBBER, *EFFECT OF WAR ON CONTRACT* (London, 1940), p. I.
28. The Permanent Court of Arbitration in the case of the Russian Indemnities, XI, p. 82.
29. Wright, *loc. cit.*
30. For a more detailed examination of these and other theories on war, see the writer's *POWER POLITICS*, *supra*, p. 129 *et seq.*
31. Cf. Q. WRIGHT, *THE CAUSES OF WAR AND THE CONDITIONS OF PEACE* (London, 1935), p. 21 *et seq.*
32. GENTILI, *loc. cit.*, Bk. III, Ch. XXIV.
33. *Op. cit.*, Bk. III, Ch. XXI, I, I, and CICERO, *PHILIPPICA*, VII.
34. *Op. cit.*, Bk. I, Ch. I, 8.
35. Cf. A. D. McNair, *The Legal Meaning of War*, GROTIUS SOCIETY, XI, p. 33, and J. L. Brierly, *International Law and Resort to Armed Force*, *CAMBRIDGE LAW JOURNAL*, 1932, p. 314.
36. On the attitude of American courts which have a similar tendency to leave such "political" decisions in the hands of the Executive, see Q. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (New York, 1922), p. 172 *et seq.*, and W. J. Ronan, *English and American Courts and the Definition of War*, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 31 (1937), p. 650.
37. A. C. (1902) 484, at p. 497.
38. *Ibid.*, pp. 497-498.
39. F. E. SMITH, *INTERNATIONAL LAW* (London, 1903), p. 90.
40. Cf. T. E. HOLLAND, *op. cit.*, p. 130 *et seq.*; A. E. HOGAN, *PACIFIC BLOCKADE* (Oxford, 1908); J. WESTLAKE, *COLLECTED PAPERS* (Cambridge, 1914), p. 572 *et seq.*; E. C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* (Washington, 1921); C. C. HYDE, *INTERNATIONAL LAW* (Boston, 1922), Vol. II, p. 192; P. H. Winfield, *The History of Intervention in International Law*, B.Y.I.L., 1922-1923, p. 130 *et seq.*; *The Grounds of Intervention in International Law*, *ibid.*, 1924, p. 149 *et seq.*; S. Maccoby, *Reprisals as a Measure of Redress Short of War*, *CAMBRIDGE LAW JOURNAL*, 1926, p. 60 *et seq.*; A. E. HINDMARSH, *FORCE IN PEACE*, Cambridge (Mass.), 1933;

H. Rumpf, *Is a Definition of War Necessary?* BOSTON UNIVERSITY LAW REVIEW, 1938, p. 705 *et seq.*

41. Sir Robert Phillimore, *op. cit.*, Vol. III, p. 16.

42. A. G. HEFFTER, *LE DROIT INTERNATIONAL DE L'EUROPE* (edited by F. H. Geffken), Paris, 1883, p. 246; TH. BATY, *THE CANONS OF INTERNATIONAL LAW* (London, 1930), p. 110; C. Parry, *Some Nineteenth Century Pacific Blockades*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, 1938, p. 672 *et seq.*

43. See on the blockade by France of Formosa (1884), HALL-HIGGINS, *A TREATISE ON INTERNATIONAL LAW* (London, 1924), pp. 439–440; on the British-German-Italian blockade of Venezuela, J. Basdevant, *L'Action Coercitive Anglo-Germano-Italienne contre le Venezuela*, R.G.D.I.P., 1904, p. 422 *et seq.*, and WESTLAKE, *op. cit.*, p. 585.

44. The inability of modern doctrine, based on the assumption of the alternative of peace and war, adequately to deal with the use of force in "peace," may be illustrated by a few examples: H. WHEATON, *HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA* (New York, 1845), p. 759: "It remains . . . an undefined and undefinable exception to the mutual independence of nations"; Hall-Higgins, *op. cit.*, p. 434: *Reprisals are acts of war in fact, though not in intention*; E. M. Borchard, "War" and "Peace," *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 27 (1933), pp. 115–116: "It must be conceded that *de facto* war, with or without a full state of war, is one of the commonest of phenomena, and . . . it cannot be reconciled with a state of peace"; OPPENHEIM'S *INTERNATIONAL LAW* (edited by H. Lauterpacht, London, 1940), Vol. II, p. 107: "Compulsive means are in theory and practice considered peaceable, although not amicable means of settling international differences"; H. Lauterpacht, "Règles Générales du Droit de la Paix," *HAGUE RECUEIL*, T. 62 (1937), p. 191: "*Le droit international conçu comme un ensemble de règles réglant la paix (ou, ce qui revient au même, interdisant la violence).*" See, however, G. W. Keeton, *Legal Guarantees of Peace*, CZECHOSLOVAK Y.B.I.L., London, 1942, p. 41.

45. Cf. the writer's *POWER POLITICS*, *supra*, Pt. I.

46. See, on the different forms of power, B. RUSSELL, *POWER* (London, 1938).

47. See on the unlimited right to war in modern international law, HALL-HIGGINS, *op. cit.*, p. 82, and on the attitude of British practice, the note of Mr. Christie to the Marquis of Abrantes (Dec. 30, 1862) and the dispatch of Earl Russell to Mr. Lettsom (Dec. 24, 1864), *Fontes Juris Gentium*, Series B., Sec. I, Tomus I, Part II (1856–71), Nos. 2398 and 2375. The measures applied by France and Great Britain against Holland in order to achieve the separation of Belgium in 1832–33 (HOGAN, *op. cit.*, p. 80 *et seq.*) and similar measures of "international police" (HALL-HIGGINS, *op. cit.*, p. 441) show that State practice interprets liberally the conditions assumed by doctrine to limit the use of force in "peace." As Brierly observes, "all these writers seem conscious of a certain unreality in the profession of the law to regulate reprisals" (*loc. cit.*, p. 309). See also C. Eagleton, *The Form and Function of the Declaration of War*, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 32 (1938), p. 19 *et seq.*

48. A. ROUGIER, *LES GUERRES CIVILES ET LE DROIT DES GENS* (Paris, 1903); resolution adopted by the *Institut de Droit International*, 1900, in *CARNEGIE ENDOWMENT, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW* (New York, 1916), pp. 157–159; H. A. SMITH, *GREAT BRITAIN AND THE LAW OF NATIONS* (London, 1932), Vol. I, p. 261 *et seq.*, particularly also the opinion quoted there of Dr. Lushington (May 29, 1823, p. 293): "To apply the strict principles of the Law of Nations to a state of things so anomalous, would, I apprehend, tend only to mislead the parties interested, for these questions are always mixed up with political considerations, and the practise will in some degree differ from the theory. Of this we have many instances in regard to Spanish South America, the British Government having endeavoured to carry on its intercourse on equitable and beneficial principles, rather than adhere to the letter of

the Law of Nations." See also Earl Russell's dispatch to Lord Lyons (Washington), Oct. 3, 1861, *Fontes Juris Gentium*, loc. cit., No. 2431. As Smith himself holds, "the true doctrine is that the recognition of the insurgent government is the necessary and logical consequence of recognizing the fact of war." (*Some Problems of the Spanish Civil War*, B.Y.I.L., 1937, p. 18.)

49. See G. G. Wilson, *Insurgency and International Maritime Law*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 1 (1907), p. 46 et seq.; HALL-HIGGINS, op. cit., pp. 46-47; A. D. McNair, *The Law relating to the Civil War in Spain*, L.Q.R., 1937, p. 484 et seq. (particularly on the quasi-blockades established by insurgents); H. Lauterpacht, *Recognition of Insurgents as a de facto Government*, M.L.R., 1939, p. 4.

50. Cf. HALL-HIGGINS, op. cit., pp. 36-37.

51. Op. cit., Bk. I, Ch. I, S. 2, I: "Status per vim certantium qua tales sunt." See J. WESTLAKE, INTERNATIONAL LAW, Vol. II (Cambridge, 1913), p. I, and A. D. McNair, loc. cit., p. 33.

52. WESTLAKE, *ibid.*, p. 8. This form of declaration of war was used for the last time in 1657 when Sweden declared war against Denmark by a herald-at-arms sent to Copenhagen (SIR TRAVERS TWISS, op. cit., p. 62).

53. T. J. LAWRENCE, *WAR AND NEUTRALITY IN THE FAR EAST* (London, 1904), p. 26 et seq.

54. HALL-HIGGINS, op. cit., p. 941.

55. Cf. WESTLAKE, op. cit., p. 1; OPPENHEIM'S INTERNATIONAL LAW, *ibid.*, p. 168; and C. Eagleton, *The Attempt to Define War*, INTERNATIONAL CONCILIATION, 1933, p. 259 et seq.

56. Cf. WESTLAKE, *ibid.*, pp. 1-2; McNair, loc. cit., p. 45; OPPENHEIM, *ibid.*, p. 241. See also the pertinent comment of Sir Wilfrid Greene, M.R., in *Kawasaki Kisen Kaisha v. Bantam S. S. Co., Ltd.*: "What *animus belligerendi* meant was again a matter of obscurity, and to define war by relation to it came near to define war by itself" (A.C. 55, T.L.R. 503, at p. 505) and the observations of Sir John Fischer Williams, *The Covenant of the League of Nations and War*, CAMBRIDGE LAW JOURNAL, 1933, p. 8 et seq.

57. Thus, States may slip as informally from war into peace as from peace into war. Cf. HYDE, op. cit., pp. 820-821; C. C. Transill, *Termination of War by Mere Cessation of Hostilities*, L.Q.R., 1922, p. 26 et seq.; W. E. Beckett, *The Right to Trade and the Right to Sue*, *ibid.*, 1923, p. 89 et seq.

58. CARNEGIE ENDOWMENT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES (New York, 1921), Vol. III, p. 169. In the view of the German Supreme Court, "although the Chinese expedition of 1900-1901 did not conduct a war in the sense of international law, and no declaration of war was made on China, it found itself nevertheless in a situation similar to that of war" (R.G.Z. 58, p. 328).

59. E. C. Stowell, *Convention Relative to the Opening of Hostilities*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 2 (1908), p. 55.

60. See WESTLAKE, COLLECTED PAPERS, *supra*, pp. 591-592.

61. Cf. Eagleton, *Attempt to Define War*, loc. cit., pp. 250, 259 et seq.

62. D. H. MILLER, THE DRAFTING OF THE COVENANT (New York, 1928), Vol. I, pp. 59, 213, 214 and 222, and Vol. II, pp. 12, 81-84, 101, 138 and 149.

63. See McNair, loc. cit., pp. 226-227, and the writer's POWER POLITICS, *supra*.

64. Cf. R. M. COOPER, AMERICAN CONSULTATION IN WORLD AFFAIRS, New York, 1934, p. 114 et seq.

65. Lytton Report, p. 138.

66. Cf. J. L. Briery, *Sanctions*, GROTIUS SOCIETY, XVII, p. 79: "It seems clear that the action of Japan has not constituted a 'resort to war' in breach of her obligations under the Covenant"; Q. Wright, *When Does War Exist?* AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 26 (1932), p. 367; H. Lauterpacht, "Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute, *ibid.*, Vol. 28 (1934), pp. 48 and 52. See, however, Eagleton, *ibid.*, p. 250.

67. Cf. Borchard, *loc. cit.*, p. 116, and Eagleton, *ibid.*, p. 284 *et seq.*

68. Text of the note of June 23, 1928, in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 22 (1928), p. 109.

69. Part VIII, Sec. I, Annex II, § 18, AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 13 (1919), p. 264.

70. Cf. A. D. McNair, B.Y.I.L., 1924, p. 182, and on *The Legality of the Occupation of the Ruhr*, *ibid.*, p. 17 *et seq.*

71. Exchange of declarations between the Government of Germany and the Belgian, British, French, Italian, and Japanese Governments of Jan. 20, 1930 (British and Foreign State Papers, 1930, Pt. I, p. 42); AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 24 (1930), p. 271.

72. Preamble of the Nyon Agreement regarding submarines, par. 2: "Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930, with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity which should justly be treated as acts of piracy." (B.Y.I.L., 1938, p. 205). See also the additional agreement concerning surface vessels and aircraft (*ibid.*, p. 206). The agreements also are printed in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 31 (1937), pp. 179, 182.

73. For a more detailed discussion, see the writer's POWER POLITICS, *supra*, p. 33 *et seq.*, and *The Three Types of Law*, ETHICS, 1943, p. 89 *et seq.*

74. This latter type of law has been well described by G. NIEMEYER, LAW WITHOUT FORCE (Princeton, 1941).

75. For a more detailed discussion, see the writer's POWER POLITICS, *supra*, p. 138 *et seq.*